IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 83 of 1989

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VALABHAI AMAJIBHAI VANKAR - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Defendant(s)

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Appearance :
MR VD PARGHI for Appellant(s) : 1,
MR AY KOGJE AGP for Defendant(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 07/12/2006

ORAL JUDGMENT

1. Mr.V.D. Parghi, learned counsel for the appellant and Mr.A.Y. Kogje, learned Assistant Government Pleader for the respondents State.

2. The appeal has been admitted for hearing the parties on the following substantial question of law;

   “In the facts and circumstances of the case, whether the lower appellate court committed an error in holding that the plaintiff was precluded from filing the suit in view of the provisions of Order 9 Rule 9 of C.P.Code?”

3. The plaintiff filed Regular Civil Suit No.117 of 1984 challenging the order No.301/S.C./Terminate/84 dtd.17/1/1984. The suit was dismissed under Rule 8 of Order IX and an application under Rule 9 of Order IX was not filed by the plaintiff, instead, under legal advice, as it appears, he sent another notice under sec.80 of the Code of Civil Procedure to the respondents and as the respondents did not repair the damage, he filed present suit being Regular Civil Suit No.330 of 1985 in the court of learned Civil Judge (SD), Godhara seeking very same reliefs. The learned Civil Judge vide his order dtd.9/12/1995 dismissed the suit mainly on the ground that the second suit was not maintainable in view of the mandatory provisions contained in Rule 9 of Order IX of the Code of Civil Procedure. Being dissatisfied by the said

judgment and decree, the plaintiff filed Regular Civil Appeal No.9 of 1986, but the same came to be dismissed on 5/3/1988. While dismissing the appeal, the learned first appellate court observed that though on merits the plaintiff's case was worth consideration, but the same being not maintainable under Rule 9 of Order IX, no relief can be granted to the plaintiff.

4. Mr.Parghi, learned counsel for the appellant submits that present is a case where the court should have exercised its discretion in favour of the poor appellant, who under some legal advice, instead of making an application under Order IX Rule 9 of the Code of Civil Procedure, took up the entire procedure of issuing the notice and filing of the present suit. He submits that the procedural law is the handmaid to subserve the cause of justice and is not to be used against the interest of the people who do not understand law.

5. On the other-hand, Mr.Kogje, learned Assistant Government Pleader for the State submits that from the very language of Rule 9 of Order IX, it would clearly appear that for the same cause of action, the plaintiff would not be entitled to file second suit if the first suit is dismissed under Rule 8 of Order IX. His further

submission is that Rule 9 is not procedural but it affects substantive rights of the parties. Rule 8 of Order IX of the Code of Civil Procedure reads as under;

"**Rule 8 of Order IX. Procedure where defendant only appears.-** Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, here part only of the claim has been admitted, shall dismiss the suit so far as it relates to remainder."

A conjoint reading of Rule 8 read with Rule 9 of Order IX would make it clear that in case the defendant admits the claim, the Court may pass a decree in favour of the plaintiff even in absence of the plaintiff and may dismiss the suit so far as it relates to remainder. Juxtapose reading of Rule 9 it would appear that where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to

set the dismissal aside, and if the Court is satisfied that there does exist sufficient cause for his non-appearance, the Court may set aside the dismissal and restore the suit to its original number.

6. Rule 8 read with Rule 9 would make it clear that Rule 8 and Rule 9 are not simply procedural but in fact, they affect the substantive rights of the parties.
7. In the opinion of this Court, the second suit was, in fact, not maintainable and the two courts below were justified in dismissing the suit.
8. At this stage, Mr.Parghi, learned counsel for the appellant submits that the appellant be allowed to make an application under Rule 9 of Order IX, with an application seeking condonation of delay and extension of time explaining the facts to the said court that under the present set of circumstances, the delay deserves to be condoned and because of availability of the sufficient cause, the suit should be restored.
9. In the opinion of this Court, such an application can always be filed by the plaintiff, if he desires to make an application for restoration of the earlier suit. It would, however, be for the said court to consider all the

questions and decide the matter on the merits.

10.The appeal is dismissed. No costs.

11.Let a decree be framed accordingly.

(R.S. GARG, J.)

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